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Supreme Court of the United States

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Docket No. 732

SILVIO DE VITA, *Petitioner,* vs. STATE OF NEW JERSEY.	On Petition for Writ of Certiorari to the Supreme Court of the State of New Jersey.

REPLY BRIEF FOR PETITIONER, SILVIO DE VITA

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Summary of Argument

POINT A

There was a denial of due process and the confession was improperly admitted in evidence.

POINT C

De Vita's rights were prejudiced by the inflammatory remarks of the Prosecutor.

POINT E

De Vita suffered manifest wrong or injury in the charge of the court and in common error appearing on the face of the record.

ARGUMENT

POINT A

There was a denial of due process and the confession was improperly admitted in evidence.

In Roesel v. State, 62 N. J. L. 216, cited by the State, the Court stated,

> A confession obtained either by the flattery of hope or by the impressions of fear is not admissible in evidence.

In State of New Jersey v. Pierce, 4 N. J. 252, our Court said,

> Whenever there has been any unintentional delay in taking an arrested person before a magistrate in violation of our rule, careful scrutiny will be given to the conditions under which a statement was taken from him during the period of delay.

In State of New Jersey v. Cole, 136 N. J. L. 606, cited by the State, it was held,

> The true criterion as to whether a confession is voluntary is the actual state of mind of the accused at the time the confession is made.

An examination of the State's brief shows,

(p. 6) The crime was not immediately solved, but an intensive investigation was begun by the Newark police and the Essex County Prosecutor's Office, in an effort to solve not only the murder of Law but various other armed robberies of a similar nature which had been committed in Essex County over a period of several months and which had remained unsolved.

(p. 7) In police headquarters, all three men were subjected to intermittent questioning by the police in connection with the series of armed robberies which had occurred in the City of Newark and Essex County.

(p. 8) Immediately following the oral admissions of all three to the police, on the night of the 15th, at about 11:00 p. m. a formal criminal complaint for murder was sworn to and filed against them.

At the same time, written statements were taken from all three at police headquarters, which consumed several hours until past midnight.

(p. 9) The three defendants were arraigned on the criminal complaint on the morning of the 16th in the First Criminal Court.

(p. 18) De Vita, this petitioner, was arrested on the afternoon of the same day, November 13; and Rosania, the "finger" man, was taken into custody the following day, the 14th.

All three arrests were made by the Bandit Squad, and the prisoners were taken to Newark police headquarters for questioning.

It is to be noted, and it was so proven at the trial, that the arrests were not made in connection with

the Law murder, but that these men were taken into custody, together with others, as suspects in a series of recent robberies and stickups committed in the general Newark area which were unsolved and wherein the pattern used by the perpetrators was similar to the crime at the Universal Market.

The questioning of the three men was undertaken by members of the Bandit Squad from the time of their arrest on November 13 and 14.

(p. 19) Sergeant Kinney testified that the entire interview, including the questioning of De Vita and the confrontation by Rosania consumed "About two hours" (R. 551). And he testified that no force was used, or threats of violence made, or hope of reward held out to De Vita (R. 550).

The preceding statement in the State's brief on page 19 is contrary to the record. The record reads (R. 551),

> Q. How long was the interrogation which was held before November 16 at 6 p. m.? A. The one on the 14th you mean?
>
> Q. Yes. A. About two hours.

The State should have said, "About 2 hours on the 14th."

(p. 20) The citizen-witness went in and out of the rooms while the statements were being taken, and he questioned each one of the accused as to police treatment.

The statement of the State on page 20 is not according to the record. It should have stated (R. 646):

> Q. About how many times did you go in and out? A. We only went in once.

(p. 21) There is no basis in fact for petitioner's statement that De Vita had been "continuously interrogated for 64 hours," and that there was "long hours of uninterrupted grilling, mental duress, constant pressure," (Petitioner's Brief, p. 66, Point A). There was no such evidence at the trial.

The statement of the State on page 21 that, "There was no such evidence at the trial", is contrary to the record (R. 681, 682),

> Q. Isn't it a fact that on the night of the 13th you were put in your cell at 7:35 p. m. and you remained there until 11:15 a. m. the next morning, on the 14th? A. No, sir.
>
> Q. Didn't you stay in your cell that night of the 13th until 11:15 a. m., on the 14th? A. No, sir.
>
> Q. That is not true? A. No, sir.
>
> Q. Isn't it a fact that on the 14th you were put in your cell at 9:20 p. m. and you stayed there until the next morning, November 15, until 10:35 a. m.? A. No, sir.
>
> Q. Well, how long were you in the cell after midnight of November 13 before you were taken out of the cell again? A. The longest I ever was in the cell was an hour or two.
>
> Q. An hour or two was the longest you were ever in the cell? A. Yes, sir.
>
> Q. How long were you in the cell on the evening of the 14th, after midnight? A. They would put me in for an hour, take me out, and put me back in again.
>
> Q. Were they the same detectives that put you in and out all during the night? A. No, it wasn't the same detectives.
>
> Q. Were they members of the Bandit Squad that took you in and out on November 13? A. Will you read that over again?
>
> Q. What is that? A. Will you read that again?
>
> (The court reporter reads a previous question, as follows: "Question: Were they members of the Bandit Squad that took you in and out on November 13?")
>
> The Witness: I don't know if it was the Bandit or Homicide.
>
> Q. Was it members of either squad? A. Yes.
>
> Q. And they kept taking you out every hour or so? A. Yes.
>
> Q. All night? A. All night.
>
> Q. From 12 o'clock midnight to the next day? A. Yes, sir.

Q. Then on the next day, the 14th, they kept up the same thing until midnight of the 14th. Is that what you want us to believe? A. Yes.

Q. And from midnight of the 14th up to the next day, the 15th, they did the same thing? A. Yes.

Q. That continued right through to the 15th to the time you were arraigned in court? A. Yes.

(p. 29) On the question of petitioner's claim that he was denied the right "to contact members of his family, counsel or anyone" (B. p. 66), the New Jersey Supreme Court also passed upon the question and affirmed the rule established in our State that an accused has the constitutional right to the aid and assistance of counsel in his defense and not to save him from his own voluntary acts, citing and quoting from State v. Murphy, 87 N. J. L. 515, 528-531 (E. & A. 1915).

The record (R. 564) indicates that:

Q. In this particular case, from November 13, 1951, when De Vita was arrested, until the evening of the 15 or the early morning of the 16 when his written statement was taken, you would allow no one to see him or allow counsel to talk to him. A. I told you before that that matter did not come up as far as I know. That is the only way I can answer it.

Q. But Mr. Giuliano asked you a question, and he said, "You wouldn't allow anyone to see him"?

Mr. Giuliano: Until he questioned him, I said. I put that in my question.

Q. Until you had questioned him? A. Yes, sir.

Such was not the fact in State v. Murphy, 87 N. J. L. 515, cited by the State. In that case, the Sheriff testified that he did not refuse Hillman admission to the jail and that he permitted Hillman to interview Murphy. The request to charge was refused because it was contrary thereto. The Court refused to charge the jury that:

"The fact that the prisoner was not represented by counsel at the time of the alleged confession may be

> taken into consideration by the jury in passing upon the credibility of the confession."

The facts and circumstances in the case cited by the State are distinguishable from the case at bar as to facts and circumstances and are not applicable.

POINT C

De Vita's rights were prejudiced by the inflammatory remarks of the prosecutor.

In re: Comm. v. Meyers, 290 Pa. 573, 139 A. 374, 377, cited by the State, the Court stated:

> "The District Attorney in his official capacity exercises in a measure a judicial function. He should be cautious in expressing to the jury his opinion of the evidence, but it is also incumbent on him to see that the Commonwealth's case is fully and fairly presented. The statements of counsel which are based on facts he expects to prove, or on legitimate inferences deducible therefrom do not transcend the bounds of a legitimate opening and are not to be discountenanced by the court. The important question is whether the prosecuting officer's remarks are mere assertions intended to inflame the passions of the jury or statements that are fair deductions from evidence expected to be presented."

In State v. Hauptmann, 115 N. J. L. 76, cited by the State, the Court said:

> "We are far from setting the seal of approval on any statement of the personal beliefs of counsel on either side as to the fact of guilty or innocence."

Let us examine the record. (Prosecutor's statement to the jury, R. 1115),

> "This is not the type of case the legislature had in mind when it gave jurors the right upon and after consideration of all the evidence to attach to their verdict of guilty of murder in the first degree a recommendation of life imprisonment."

and on R. 1117,

> "Let me say in all sincerity, ladies and gentlemen, that if I had recommended to this court the acceptance of a plea on a grand stand play that was made by counsel in this case, I would be untrue to my trust, and you, Mr. Gieser, would have a right to criticize the prosecutor, Mr. Congleton, in recommending the acceptance of such a plea, and so would you, Mr. George, and so would the newspapers have a right to condemn and criticize not only myself but the Prosecutor of this county in recommending to this Court the acceptance of a plea of *non vult* to a murder of this type. In my judgment the law would not permit it."

(R. 1121):

> "But what were Grillo and his associates doing while our boys are dying in Korea? He was riding back and forth from Florida, collecting souvenirs. What contribution is Grillo & Company making to democracy? You answer that by your verdict. So much for Mr. Sommer."

(R. 1131, 1132):

> "Something has been said about life imprisonment. It has been mentioned that it means twenty-five years in State's Prison. The law provides that; but the law also provides that a man who is sentenced to life imprisonment can be given time off, and is entitled to it under the law. A man or a person sentenced to life imprisonment is subject to parole under our law after serving fourteen years and a few months."
>
> "Counsel says, 'Give them a chance.' Do you want to take a chance with them? Go ahead. Do you want them back in circulation after fourteen and a half years? Go ahead. Do you want to get rid of them forever? Return a verdict of guilty of murder in the first degree. Give Grillo a chance to go out again fourteen years hence? Give his associates the same chance? Why?"

In the State's brief, (p. 39) the State says:

> Any possible prejudice that may have been created by the Prosecutor's remarks complained of were amply and adequately cured by the Court's instruction on the accepted law in New Jersey with respect to the statute in question and its purpose and effect.

The State thus concedes that "possible prejudice" could have arisen from the Prosecutor's remarks.

In State v. Tansimore, 3 N. J. 516, cited by the State, Mr. Justice Heher, in his dissenting opinion, stated,

> First degree murder is a crime of the first magnitude and the interests of society demand punitive measures commensurate with its character, but it is no less important that one accused of an offense of such gravity be accorded all the basic safeguards of due process designed to secure him against an adjudication of guilt unless all the ingredients of the crime are proved beyond a reasonable doubt.

No possible prejudice ought to be allowed to take one's life.

POINT E

De Vita suffered manifest wrong or injury in the charge of the Court and in common error appearing on the face of the record.

The State on Page 51 of the brief, concedes that:

> The charge was not conspiracy but murder, the indictment being the usual common law form which is permitted in New Jersey.

On Page 52, the State contradicts this statement and says:

> The court's charge was in conformity with the established law of New Jersey that, where several persons enter into a conspiracy for the common object of committing robbery, and, in the perpetration or attempted perpetration of the crime, one of the conspirators does

> an act which causes the death of a third person, all are principals in the commission of the homicide which is murder in the first degree by statute.

The petitioner's appendix (p. 186) sets forth the law as to conspiracy and as to murder. Each being a separate crime. There was a confusion of issue, a conflict as to the law and the charge thereof. The indi 'ment (R. p. 226) did not involve conspiracy. The jury had to determine between two conflicting statements of law. The charge and the verdicts are a nullity.

The method of polling a jury is set forth in De Vita's brief (p. 173):

> The polling of the jury is a procedure whereby the jurors are asked individually the finding they have arrived at, as denoted by the questions posed by the Clerk, "How do you find?" The practice of long standing requires each juror to answer for himself, thus creating individual responsibility, eliminating any uncertainty as to the verdict announced by the foreman. Each juror answering, "Yes," to an inquiry is not the formula to be adopted in a homicide case. Each juror must answer for himself and state his verdict; otherwise, the province of the jury is transgressed by the Clerk.

Equal justice under law possible only when due process is observed.

Conclusion

For the reasons hereinbefore and herein set forth, it is respectfully submitted that a writ of certiorari be allowed.

Respectfully submitted,

HARRY KAY,
Attorney for Petitioner,
Silvio De Vita.